

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: June 01, 2010
Judgment delivered on: July 02, 2010

+ **CRIMINAL APPEAL NO.939/2009**

MANISH @ SONU

....APPELLANT

Through: Mr. V. Madhukar, Advocate with
Mr. Sachin Dev Sharma, Mr. Hakikat
Yadav, Mr. Rajiv Sharma & Mr. Janendra
Sevada, Advocates

Versus

STATE OF DELHI

.....RESPONDENT

Through: Mr. Lovkesh Sawhney, APP

CORAM:

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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| 1. | Whether Reporters of local papers
may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not ? | Yes |
| 3. | Whether the judgment should be
reported in Digest ? | Yes |

AJIT BHARIHOKE, J.

1. This appeal is directed against the conviction of the appellant Manish @ Sonu for the offence of home trespass and murder of Kranti Devi punishable under Section 302 and 452 IPC both read with Section 34 IPC vide impugned judgment dated 23.10.2009 and consequent order on sentence dated 28.10.2009.

2. Briefly stated, case of the prosecution is that PW8 Naval Prasad was residing in House No.C-182, Nihal Vihar, Nangloi along

with his wife, four sons and three daughters. His eldest daughter Sarita (PW7) was 17 years old. House of Amar Singh was adjacent to the house of Naval Prasad.

3. The appellant and his co-accused Manoj @ Manohar (a juvenile) used to come and sleep on the roof of the house of Amar Singh. This was not liked by PW Naval Prasad and his wife Kranti (hereinafter referred to as the “deceased”) as they had young daughters in their house and also because of the fact that on some occasions Manoj @ Manohar used to sleep after removing his pants. Naval Prasad and the deceased had even protested and requested Amar Singh that he should not permit the appellant and his co-accused to sleep on his roof. For this reason, earlier there had been exchange of hot words and abuses between the parties.

4. On 10.09.2001 PW Naval Prasad returned home from his work at around 9:30 - 9:45 pm. He was sitting on the roof of his house and was preparing to have meals. The deceased Kranti and his daughter Sarita told him that earlier in the day, the appellant Sonu and co-accused Manoj had visited and insisted that they would continue to sleep on the roof of the house of their neighbour and if they objected to that, their house would be blown with a bomb. PW Naval Prasad had not even changed his clothes when the appellant Sonu and his co-accused Manoj came on the roof of his house from

the roof of house of Amar Singh and attacked Naval Prasad while abusing him. Appellant Sonu caught hold of Naval Prasad and his co-accused Manoj stabbed him with knife, as a result of which he sustained injury above his left eye. When the deceased tried to catch hold of Manoj @ Manohar in order to save her husband, the appellants Manoj and Sonu stabbed her on the chest with a knife, as a result she started bleeding and fell down. On this, Sarita (PW7), who was present at the roof, started throwing bricks at the appellant and his co-accused and they were hit by the bricks resulting in injuries to them. However, both the accused escaped from the spot. Naval Prasad and Sarita took the deceased to Sanjay Gandhi Memorial Hospital in a three-wheeler scooter where she was declared brought dead.

5. The police machinery was set into motion in this case with recording of DD No.29 dated 10.09.2001 at 11:00 pm on the receipt of information relating to a quarrel at the shop of one Kamal RZC-174 at 50 feet wide road. Copy of said DD report was entrusted to Head Constable Kishan Lal for verification. In the meanwhile, another information was received at the police post from Duty Constable Sanjay posted at Gandhi Memorial Hospital that PW Naval Prasad had brought the deceased to the Hospital who on examination was declared brought dead. This information was recorded at 11:45 pm as DD No.30 and copy of the DD report was

entrusted to SI Rajni Kant, who proceeded to the Hospital along with Constable Lal Chand.

6. At the Hospital, SI Rajni Kant met Head Constable Kishan Pal who handed over copy of the DD No.29 to him. SI Rajni Kant collected the MLCs of the deceased as well as PW Naval Prasad. The appellant as well as co-accused Manoj had also been brought to the Hospital in injured condition. Inspector Inder Singh, SHO P.S. Nangloi also reached there and he took over the investigation.

7. From the hospital, Inspector Inder Singh along with SI Rajni Kant, PW8 Naval Prasad, PW7 Sarita and the accused persons, came to the place of occurrence.

8. The Investigating Officer inspected the scene of crime and prepared the rough site plan with the assistance of complainant Naval Prasad. He got the spot of occurrence photographed. There was blood scattered on the roof of the house of the complainant. Blood sample was lifted from the spot of occurrence, sealed in a parcel with the seal of "IS" and taken into possession. The clothes of the appellant as well as co-accused Manoj were stained with blood. They were made to remove their clothes which were sealed in separate packets and taken into possession. Appellant as well as his co-accused were arrested.

9. On interrogation, both the accused made disclosure statements. Appellant Manish @ Sonu, pursuant to his disclosure statement led the police party to the roof of house No.RZC-174, Nihal Vihar and from there, he got recovered the weapons of offence i.e. the knife Ex.P2 as well as a blade of scissor Ex.P1 from under the cloth lying by the side of the parapet wall. Both weapons were measured; their sketches prepared; the weapons were converted into separate sealed packets and taken into possession.

10. The Investigating Officer conducted the inquest proceedings. He sent the dead body for post mortem and collected the post mortem report. The weapons of offence were also sent to the Autopsy Surgeon for seeking his opinion. As per his opinion, the injuries on the person of the deceased could be possible by the knife Ex.P2. Scaled site plan was also got prepared. The exhibits were sent to CFSL for examination and as per the CFSL report Exhibits PX and PY, human blood of blood group "A" was found on the clothes of the appellant as well as his co-accused, which matched with the blood group of the deceased. On completion of investigation, the charge was filed under Section 452/302/307/34 IPC against the appellant as well as his co-accused.

11. Accused Manohar @ Manoj was found to be a juvenile; as such his case was separated and forwarded to juvenile court for trial. The

appellant Manish @ Sonu was charged for the offences punishable under Section 452 and Section 302 IPC. The appellant pleaded not guilty to the charge and claimed to be tried.

12. In order to bring home the guilt of the appellant, prosecution has examined 21 witnesses, including the eye-witnesses PW7 Sarita, daughter of the deceased and PW8 Naval Prasad, husband of the deceased.

13. The appellant, in his statement recorded under Section 313 Cr.P.C., has denied the case of prosecution. His defence is that he has been falsely implicated in this case and he has no connection with the co-accused Manohar. He further explained that the case property has been planted upon him and nothing was recovered at his instance.

14. Before adverting to the submissions of the rival parties, we feel that it will be useful to have a glance upon the gist of the material witnesses for proper adjudication of this appeal.

15. PW8 Naval Prasad, complainant is the maker of the FIR. He, in his statement in the court has reiterated his version narrated in his statement Ex.PW8/A, which formed basis for registration of the case. He also stated that during investigation, he pointed out the spot of occurrence to the police, which was got photographed and that blood-stained clothes of the appellant as well as his co-accused were seized in his presence vide respective memos Ex.PW8/E and Ex.PW8/D. He

has identified the blood-stained pant and shirt which the appellant Manish @ Sonu was wearing collectively as Ex.P4.

16. PW7 Sarita, daughter of the deceased testified that the appellant and his co-accused Manohar @ Manoj used to come to the roof of their neighbour Amar Singh. Her mother had told them that they should sleep on the roof of their house and should not come and sleep at the roof of the house of Amar Singh. She further stated that her mother even requested the wife of Amar Singh that they should not permit the appellant and Manoj to come on their roof. On 09th September, 2001, between 1:00 to 2:00 pm, the appellant and Manoj came to their house and claimed that they would continue to sleep on the roof of Amar Singh's house and if they were stopped from sleeping there, they would blow away their house with a bomb and thereafter, they left hurling abuses. She further stated that on 10th September, 2001 at about 09:00 pm, the appellant and Manoj again came to the roof of Amar Singh. She and her mother told her father Naval Prasad about the visit of the appellant and Manoj and the threats given by them. On the fateful night, when Naval Prasad was coming out of the bathroom, appellant and Manoj came on the roof of their house. At that time, she had gone downstairs with her mother to bring food. Accused Manoj stabbed her father on the head with a knife. On this, her mother immediately put down the food and caught hold of her father. As soon as she caught hold of Naval Prasad, the appellant Sonu stabbed her with a knife on the chest. As a result of the injury, she started bleeding.

Thereafter, they went to the police post and police came to their house and took them to the hospital, where her mother was declared dead.

17. PW11 Dr. Komal Singh is the Autopsy Surgeon. She has stated that on post-mortem examination, she found following injuries on the person of the deceased:

“On External examination, there was a clean incised wound on the left side of the chest at 8 intercostal place 6 c.m. below the left nipple obliquely present, margins were inverted and its base contained blood. Its size was 2 c.m. X 1 c.m. and its one angle was acute and the other one was obtuse. It appeared to be viscera deep.

On Internal examination, there was corresponding cut on the intracostal muscles, pericardium of the heart was clean cut which was traced upto the apex of the heart which had the wound of 1.8 c.m. X 1 c.m. Cut went upto the ventricular of the heart. Surrounding tissues were soiled with the clotted blood. 1.5 ltr clotted and liquid blood was present in the thoracic cavity. Brain was pale and other organs were also pale”.

In her opinion, cause of death was haemorrhagic shock due to the penetrating injury to the heart and the injury was sufficient to cause death in ordinary course of nature. The injury was ante mortem and time since death was approximately 16 hours.

18. She further stated that on 17th October, 2001, Investigating Officer produced two sealed '*pullandas*' containing weapons with a request for giving opinion if the injury on the person of the deceased could be caused by those weapons. The said '*pullandas*' contained a knife and a blade of scissor and on examination, she found that injury on the chest of the deceased could be possible by the knife.

19. PW21 SI Rajni Kant conducted initial investigation of the case but main investigation was conducted by the SHO Inspector Inder Singh. PW21 SI Rajni Kant has stated that he admitted the appellant and his co-accused Manoj at Sanjay Gandhi Memorial Hospital. They were discharged after medical examination and were brought to the spot of occurrence. Their clothes were stained with blood, which were taken into possession by the Investigating Officer. He has also stated that on interrogation, the appellant as well as his co-accused made disclosure statements and they both led the police party to the house of the appellant i.e. RZC-174, Nihal Vihar and from there, they got recovered one knife and a blade of scissor, which were seized after preparing their sketches and converting them into sealed packets.

20. The learned Additional Sessions Judge, relying upon the eye witness account of the occurrence given by PW7 and PW8 as also the evidence of seizure of blood-stained clothes of the appellant which he was wearing at the time of his arrest as well as the recovery of the weapon offence at his instance, found the appellant guilty of charges under Section 302 IPC as well as Section 452 IPC and convicted and sentenced him accordingly.

21. Learned Sh. V. Madhukar, Advocate for the appellant has taken us through the evidence on record and submitted that the case of the prosecution is mainly based upon the eye-witness account of the occurrence given by purported eye-witnesses PW7 Sarita and PW8

Naval Prasad, daughter and husband of the deceased. Learned counsel submitted that learned Trial Court has fallen in grave error in relying upon the evidence of PW7 and PW8, who are not worthy of credence. His criticism to their testimony is multipronged which we propose to deal with in later part of the judgment.

22. First contention of learned counsel for the appellant is that admittedly PW7 and PW8 are the daughter and the husband of the deceased. They, being closely related to the deceased, to a certain extent fall within the category of interested witnesses. Hence, it is not safe to rely upon their version in absence of any corroboration from the testimony of some independent witnesses.

23. It is true that PW7 and PW8 are daughter and husband of the deceased and for that reason, to some extent they can be termed as interested witnesses. This, however, does not mean that they are untruthful witnesses or their testimony is liable to be discarded at the threshold because of their relationship with the deceased.

24. In the matter of **Harbans Kaur Vs. State of Haryana**, AIR 2005, SC 2989, the Supreme Court observed thus:

7. “There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused. No evidence has been led in this regard. So far as the delay in lodging the FIR is concerned, the witnesses have clearly stated that after seeing the deceased in an injured condition immediate effort was to get him hospitalized and get him treated. There cannot be any generalisation that whenever there is a delay in lodging the FIR, the prosecution case becomes

suspect. Whether delay is so long as to throw a cloud of suspicion on the seeds of the prosecution case, would depend upon the facts of each case. Even a long delay can be condoned if the witnesses have no motive of implicating the accused and have given a plausible reason as to why the report was lodged belatedly. In the instant case, this has been done. It is to be noted that though that was cross-examination at length no infirmity was noticed in their evidence. Therefore, the trial Court and the High Court were right in relying on the evidence of the prosecution witnesses.”

25. In the matter of **Ram Lakhan and Others Vs. State of U.P., 1996 (2) CC Cases 122 (SC)**, it has been held by the Hon’ble Supreme Court that evidence of a close relative cannot be excluded merely on the ground that they are interested witnesses. It is the duty of the court to scrutinise the evidence of such witnesses very carefully and if there is any doubt as regards their truthfulness, the court may discard their evidence.

26. Similarly in the matter of **Ramji Surjya and Another Vs. State of Maharashtra, 1983 (2) Crimes, 237**, Hon’ble Supreme Court held thus:

“(8).There is no doubt that even where there is only a sole eye witness of a crime, a conviction may be recorded against the accused concerned provided the Court which hears such witness regards him as honest and truthful. But prudence requires that some corroboration should be sought from the other prosecution evidence in support of the testimony of a solitary witness particularly where such witness also happens to be closely related to the deceased and the accused are those against whom some motive of ill-will is suggested.”

27. From the proposition of law enunciated above, it is apparent that evidence of the witnesses related to the deceased cannot be discarded on sole ground of relationship. However, testimony of such witnesses

is required to be scrutinized carefully to seek assurance of truthfulness before acting upon the same. In the light of above principles of law, we now proceed to assess the credibility of the version of PW7 and PW8.

28. Learned counsel for the appellant submitted that considering the fact that PW7 Sarita and PW8 Naval Prasad are close relations of the deceased, their testimony is required to be scrutinised with greater care and caution. He argued that though it is admitted case of the prosecution that Ram Samoj, tenant of PW8 Naval Prasad, was present at the roof of the house when the occurrence took place, the prosecution has failed to examine him. He submitted that failure of the prosecution to examine said independent witness of the occurrence casts a doubt on the reliability on the version of PW7 and PW8.

29. We find no merit in this contention. On perusal of the challan, it is apparent that tenant Ram Samoj was cited as a witness for the prosecution. He, however, could not be examined as he had left the given address and was not traceable. This is apparent from the trial court record, particularly the proceedings recorded by the learned Trial Court on 20.02.2007 and 02.05.2007. Since the independent witness Ram Samoj could not be produced as a witness due to circumstances beyond the control of prosecuting agency, his non-examination cannot be taken as a circumstance to doubt the veracity of PW7 and PW8.

30. The next contention on behalf of the appellant is that as per the case of prosecution, the motive for the crime was insistence of the

appellant and his co-accused to sleep on the roof of the house of Amar Singh, which was objected to by the deceased. Learned counsel for the appellant pointed out that as per PW7 Sarita and PW8 Naval Prasad, because of the aforesaid controversy, the appellant and his co-accused had visited the house of the deceased on 09.09.2001 and threatened that in case they objected to sleeping of the appellant and his co-accused on the roof of the house of Amar Singh, they would blast their house with a bomb. Learned counsel argued that if this version of PW7 and PW8 is to be believed then, under the natural course of circumstances, there ought to have been a complaint in respect of said threat to the police. However, no such complaint has been placed on record nor it is the case of the prosecution that any such complaint was made. Learned counsel further submitted that as per the witnesses, prior to the occurrence the deceased had protested against the sleeping of the appellant and his co-accused on the roof of house of Amar Singh, to the wife of Amar Singh. Despite that, neither Amar Singh nor his wife has been examined to corroborate their aforesaid version. From this, learned counsel for the appellant has strongly urged us to infer that the story of motive narrated by the witnesses in their testimony in the court is a concocted story. He argued that once the motive for the crime fails, the testimony of PW7 and PW8 pertaining to the occurrence also comes under cloud.

31. We find no merit in this contention. Not much can be read into failure of the deceased or her family members to report to the police

the threat extended by the appellant and his co-accused in the afternoon of 09.09.2001. The appellant and his co-accused, at the relevant time, were young boys. Therefore, there is a strong possibility that the deceased and her family members may not have taken the aforesaid threat extended by the appellant and his co-accused seriously, which explains their failure to report the matter to the police. As regards the second limb of this argument, failure of the prosecution to produce Amar Singh and his wife as prosecution witnesses is not that important a factor so as to suspect the version of PW7 and PW8, which is otherwise consistent with the prosecution story and appears to be truthful and trustworthy. Further, if the version of PW7 and PW8 in this regard was false, nothing prevented the appellant to examine Amar Singh and his wife to falsify their testimony. Otherwise also, it is well settled that failure of the prosecution to prove the motive of crime in a case based upon ocular evidence is not fatal to the prosecution case.

32. Learned counsel further contented that presence of PW7 Sartia at the time of occurrence is highly doubtful for the reason she in her examination-in-chief has stated that at the relevant time, she was downstairs as she had gone to fetch food along with her mother.

33. We find no merit in this contention. Of course, PW7 Sarita deposed so, but she also stated that when the accused Manoj hit her father on his head with a knife, her mother immediately put down the

food and caught hold of her father and it was at that time the appellant Sonu stabbed her with a knife on her chest. From this version, it is obvious that though PW7 had gone downstairs with her mother to bring food, but they had reached upstairs on the roof with the food when Manoj, co-accused, had inflicted a stab injury on PW8 Naval Prasad. Thus, we find no reason to suspect the presence of PW7 Sarita at the time of occurrence.

34. Next contention on behalf of the appellant is that PW7 and PW8 are not worthy of credence as their testimony in court suffers from several improvements vis-a-vis their previous statements made before the Investigation Officer under Section 161 Cr.P.C. In this regard, he has drawn our attention to relevant cross-examination of PW7 and PW8, which is, inter alia, reproduced thus:

“PW 7

...I had mentioned in my statement to the police that on 10.09.2001 I along with my parents and my brothers and sisters was present in my house. (*Attention of witness is drawn to the statement Mark P -7-A where the date or presence or brothers and sisters is not mentioned*) I had mentioned in my statement to the police that accused Sonu and Manoj had earlier been arrested in theft cases and my mother was afraid that they might do something in our house or with us. (*Confronted with statement Mark P-7-A where it is not so recorded*) I had mentioned in my statement to the police that my mother had a talk with wife of Amar Singh for not permitting the accused persons to come to her roof. (*Confronted with statement Mark P-7-A where this fact is not mentioned*) I had also mentioned in my statement to the police that on 9.9.2001 accused Sonu and Manoj came to our house at 1.00-2.00 PM and claimed that in case they were stopped from sleeping on the roof, they would blow away our house with a bomb and that they left uttering foul names. (*Confronted with statement Mark P-7-A where the date and the time only are not mentioned*) I had mentioned in my statement to the police that when my father was coming out of the bath-room, the accused came on the roof of our house. (*Confronted with statement Mark P-7-A*

where the portion “**when father was coming out of the bath-room**” is not mentioned)”

“PW8

... I stated before the police that at the time of occurrence I was present at the roof of my house and that our tenants were also sitting on the roof with us and that I went to the bathroom of the roof and on coming out of it, I was washing my hands and that accused Sonu who was present at the roof of his house, exhorted that he would come and sleep on the roof of house of Amar Singh and that in case we objected thereto, he would attack us with knives and bombs (attention of witness drawn to his statement Ex. PW-8/A where it is not so recorded).

I stated before the police in my statement Ex. PW-8/A that Manohar was having a broken scissor blade in his hand (confronted with portion A to A of his statement Ex. PW-8/A where it is not so recorded. What is recorded therein is that Manohar accused had attacked the witness with a knife).

I stated before the police in Ex. PW-8/A that my wife and gone downstairs to bring meals and that she also came up (confronted with portion B to B of his statement Ex. PW-8/A where it is not so recorded. What is recorded therein is that his wife also came there to save him).

I stated before the police in statement Ex.PW-8/A that my wife placed her hand on the seat of injury (attention of witness drawn to his statement Ex PW-8/A where it is not so recorded).

I did not state before the police that Manohar pulled me towards himself. I did not state before the police that my wife remained back.

I stated before the police that all my children, who were sleeping there, woke up. (attention of witness drawn to his statement Ex. PW-8/A where it is not so recorded).

I did not state before the police that my son Jitender started throwing bricks and stones on Sonu and Manohar.

I stated before the police that accused Sonu and Manohar jumped over to the roof of house of Amar Singh to run away. (confronted with portion C to C of Ex.PW-8/A where it is recorded that Sonu and Manohar ran away).

I stated before the police that I and my son Jitender and daughter Sarita ran to police post and informed the police about my injury and that my wife had been killed. (attention of witness drawn to his statement Ex. PW-8/A where it is not so recorded).

I do not remember to have stated before the police that thereafter we returned to our house with the police (attention of witness drawn to his statement Ex.PW-8/A where it is not so recorded).”

35. On reading of the aforesaid evidence, it is apparent that improvements/contradictions pointed by learned counsel for the appellant are minor in nature and can be attributed to the failure of memory because of passage of time. It is significant to note that the occurrence took place on 10.09.2001 and PW7 Sarita as well as PW8 Naval Prasad were examined as witnesses almost four years later. Therefore, some contradictions of minor nature were bound to occur. Thus, we find no reason to suspect the version of PW7 and PW8 because of aforesaid minor contradictions/improvements.

36. Learned counsel for the appellant took us through the DD No.29 dated 10.09.2001, police post Nihal Vihar (Ex.PW15/A) and submitted that as per this DD report, the quarrel had taken place at RZC-174, Shop of Kamal at 50 feet wide road, whereas the spot of occurrence has been shown by the prosecution as the roof of house of PW8 Naval Prasad. He submitted that PW8 Naval Prasad is silent about the incident which took place near RZC-174. Therefore, clearly it is a case of unfair investigation in which the place of occurrence has been shifted with a view to make the presence of PW7 and PW8 at the time of occurrence plausible. Thus, learned counsel has urged us to infer that PW7 and PW8 are not reliable witnesses.

37. We are not convinced with the argument. PW7 Sarita and PW8 Naval Prasad have categorically stated that the incident took place on the roof of the house of PW8. PW20 Inspector Inder Singh, the Investigating Officer has stated that from the hospital he came to the spot of occurrence i.e. roof of the house of Naval Prasad and on inspection, he found the blood lying scattered on the roof. He also stated that he lifted blood sample from there and seized it vide memo Ex.PW8/F. Above version of the Investigating Officer is also corroborated by PW21 SI Rajni Kant and PW8 Naval Prasad, who are witnesses to the recovery memo Ex.PW8/F. The version of these witnesses has gone unchallenged in their respective cross-examinations. It was not suggested to either of these witnesses that blood samples were not lifted from roof of the house of PW Naval Prasad. The presence of blood on the roof is sufficient assurance that PW7 and PW8 are telling the truth that the occurrence took place on the roof of the house.

38. Learned counsel for the appellant also submitted that admittedly the appellant as well as co-accused Manoj had sustained injuries, who were also taken to the hospital and their MLCs were prepared. Said injuries on the person of the appellant and his co-accused, however, have not been explained. Even their MLCs have not been placed on record which leaves a gap in the prosecution case and benefit of that must go in favour of the appellant and his co-accused.

39. It is true that the appellant and his co-accused Manoj had sustained injuries for which they were taken to Sanjay Gandhi Memorial Hospital and the MLCs were prepared. It is also true that their MLCs have not been placed on record. This, however, cannot be a reason to discard the eye witness account given by PW7 and PW8. We may add that the appellant in his statement under Section 313 Cr.P.C. vide Question No.18 was confronted with the evidence that he and his co-accused Manoj were taken to hospital and even their MLCs were prepared which were collected by the Investigating Officer, SI Rajni Kant. The appellant, in response to said question, admitted that he and his co-accused were taken to SGM Hospital and vaguely added that but it was not in connection with the occurrence in question. If the appellant had not sustained injury in the incident, its non-explanation by no means is fatal to the case of prosecution. The fact that the appellant and his co-accused admittedly sustained injuries and were taken to the hospital tends to corroborate the version of PW7 and PW8 when they stated that after the deceased was stabbed, PW7 started pelting bricks on the appellant and his co-accused and as a result, they were hit by bricks resulting in injuries to them.

40. On perusal of the record, we find that testimony of PW8 Naval Prasad is consistent with the prosecution story and it finds corroboration in the testimony of PW7 Sarita on all material aspects of the case. From the MLC of PW8 Naval Prasad, we find that he also sustained an incised wound above his left eye, which also gives an

assurance of his presence at the time of occurrence. It has also come in evidence of PW20 Inspector Inder Singh, PW21 SI Rajni Kant and PW8 Naval Prasad that the clothes of the appellant and his co-accused were stained with blood and those clothes were seized by the Investigating Officer on the same night. As per the CFSL report Exhibits PX and PY, the clothes of the appellant on chemical examination tested positive for human blood group "A", which was also the blood group of the deceased as found on her clothes which were seized during investigation. This circumstance also gives an assurance that PW7 and PW8 are telling the truth. Otherwise also, if someone else had stabbed the deceased, under the natural course of circumstances, it is unlikely that PW7 and PW8 who are close relatives of the deceased would falsely implicate the appellant and his co-accused and allow the real culprit to go scot free. Thus, we find that the learned trial Judge has rightly relied upon the testimony of ocular witnesses PW7 and PW8 to find the appellant guilty of the offence of trespass as well as murder punishable under Section 452 IPC and Section 302 IPC.

41. Learned counsel for the appellant has also raised an issue of juvenility. He submitted that the appellant was a juvenile on the alleged date of incident i.e. 10.09.2001. He was subjected to ossification test in the year 2002 under the directions of the learned Additional Sessions Judge and as per the medical opinion based upon the said ossification test, his age was fixed between 18 to 21 years as

on April, 2002, meaning thereby that the appellant was under 18 years of age on the date of incident. Learned counsel submitted that the learned Additional Sessions Judge instead of relying upon that medical opinion referred the appellant to Juvenile Justice Board for conducting an inquiry to determine his age. The Juvenile Justice Board again referred the appellant for ossification test and as per the subsequent report dated 13.08.2003, the age of the appellant as on the date of the report was fixed between 20 to 21 years. Learned counsel submitted that on the basis of said subsequent report, Juvenile Justice Board has fixed the age of the appellant as on the date of the report as 20 years and working backwards, concluded that on the date of occurrence, the age of the appellant was 18 years and 01 month and his case was referred back to be tried in accordance with the provisions of Code of Criminal Procedure by the learned Additional Sessions Judge. Learned counsel for the appellant has submitted that aforesaid conclusion of the Juvenile Justice Board is in contravention of Rule 12 of The Juvenile Justice (Care and Protection of Children) Rules, 2007 as the Juvenile Justice Board has failed to give the benefit of one year margin to the appellant. Learned counsel further submitted that the inquiry conducted by the Juvenile Justice Board is based upon the ossification test only and no effort whatsoever has been made during inquiry to collect evidence of date of birth of the appellant from his school.

42. On perusal of the Trial Court record, it transpires that pursuant to the directions of the learned Additional Sessions Judge dated

18.04.2002 inquiry for determination of age of the appellant Manish was conducted by the Principal Magistrate, Juvenile Justice Board and as per the report of the Board dated 27.09.2003, the age of the appellant was determined to be 18 years and 01 month as on the date of the commission of offence. Thus, the matter was referred back for trial to the learned Additional Sessions Judge. This inquiry report was not challenged by the appellant and instead, he submitted himself to the trial by the learned Additional Sessions Judge without any protest. From the above, it is apparent that the report of inquiry determining the age has become final and now at this late stage, the appellant who has been found guilty after trial cannot be allowed to rake up the issue of his juvenility afresh.

43. Otherwise also, on perusal of the inquiry report, we do not find any infirmity in the procedure adopted by the Principal Magistrate, Juvenile Justice Board during inquiry or her conclusion regarding the age of the appellant.

44. Rule 12(3)(b) of The Juvenile Justice (Care and Protection of Children) Rules, 2007 provides for the procedure to be followed in the inquiry under Section 7A of The Juvenile Justice (Care and Protection of Children) Act, 2000. The said Rule reads thus:

“12. Procedure to be followed in determination of Age. -----

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—

- (a)
 - (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
 - (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
 - (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;
- (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or The Juvenile in conflict with law.”

45. On perusal of the inquiry report dated 27.09.2003 of Juvenile Justice Board, it transpires that during inquiry for determination of age, the appellant did not produce his Matriculation or equivalent Certificates nor he produced the birth certificate issued by a Corporation or a Municipal Authority or a Panchayat. The date of birth certificate from the school attended by the appellant also was not available during inquiry as the school record was reported to be destroyed in a fire incident. Thus, in absence of the above proof pertaining to the age of the appellant, the learned Principal Magistrate, Juvenile Justice Board rightly relied upon the opinion of the Medical Board constituted in the year 2003, based upon ossification test fixing

the age of the appellant within a margin of one year between 20 to 21 years as on 13.08.2003. The Juvenile Justice Board apparently has given benefit to the appellant by treating his age to be 20 years as on 13.08.2003 which was on the lower side within the range of one year fixed by the Medical Board. Thus, we do not find any conflict between the finding of the Juvenile Justice Board and the Rule 12(3)(b) of The Juvenile Justice (Care and Protection of Children) Rules, 2007. If the age of the appellant is calculated backwards taking his age as 20 years as on 13.08.2003, his age on 10.09.2001 works out 18 years and 27 days. Juvenile has been defined under Section 2(k) of the Juvenile Justice Act as a person who has not completed the age of 18 years. Since the appellant was aged more than 18 years at the relevant time, he was not a juvenile at the relevant time and he has been rightly tried in accordance with the ordinary law of crimes.

46. In view of the above discussion, we find no merit in this appeal.

47. The appeal is accordingly dismissed.

AJIT BHARIHOKE, J.

JULY 02, 2010
akb/pst

A.K. SIKRI, J.